

The International Criminal Court (ICC) and the Rohingya Crisis - Jurisdiction and Future Perspectives

Dr. Sharefah A. Almuhana

Assistant Professor of Public International Law, KILAW

Abstract

This research paper attempts to examine the Rohingya crisis in light of the ICC system under the Rome Statute as well as the political and economic circumstances surrounding the crisis. Further, this research aims to uncover the systemic weaknesses and limits of the ICC. Moreover, this research raises concerns that the ICC does not have jurisdiction over the Rohingya crisis, except in accordance with the objective principle of territoriality, which in turn affects the extent of the ICC jurisdiction. Specifically, this principle would limit the ICC jurisdiction to the deportation and any criminal acts or conduct that were committed on Myanmar's territory but that produced consequences on Bangladesh's territory. Thus, many crimes and criminals would remain unpunished. Therefore, this paper aims to explore alternate paths for the international community to overcome these challenges and ensure accountability for the abuses against the Rohingya.

Keywords: International criminal law, Transnational criminal law, Transboundary crime, Cross-border crime, Extraterritorial.

I. Introduction

The UN have described the Rohingya living in Myanmar as experiencing “apartheid-like restrictions”⁽¹⁾. Estimates are that over 100,000 Rohingya are interned in over 20 camps within the Rakhine State⁽²⁾. In recent months, there has been a gradual reduction in the military presence⁽³⁾. However, the international community has shown its overall weakness and general inaction in addressing the Rohingya humanitarian crisis. This paper addresses the Rohingya crisis, which is defined as the exodus of the Rohingya people and their crossing into Bangladesh caused by their persecution and violence experienced against them in Myanmar.

The paper seeks to discover whether the International Criminal Court (ICC) is able to contribute in terms of action against crimes against humanity. The paper raises concerns that the ICC will be limited in its scope and confined to the deportation itself. This may leave unpunished those criminal acts or conduct that were committed or carried out on Myanmar’s territory. The research paper looks at the role, if any, of the ICC, in a situation where Myanmar is not a signatory of the Statute of Rome that gives the ICC jurisdiction.

Prompted by the UN Independent Fact-Finding Mission on Myanmar, the ICC prosecutor received many complaints. As already noted, the first issue is the jurisdiction of the ICC. Myanmar is not a party to the Rome Statute and this sets limitations on the ICC’s role over Myanmar territory. It is common knowledge that Myanmar will not willingly accept the ICC’s jurisdiction. However, Bangladesh is a signatory of the Rome Statute. Thus, it is possible for the ICC to seek jurisdiction over conflicts that are transnational.

On 6 September 2018, a pretrial Chamber of the ICC agreed that the court might consider transnational crimes with a nonmember state of the Rome Statute in accordance with article 12(2)(a) of the Statute⁽⁴⁾; however the key

(1) Jon Lunn, Burma: November 2018 update, Commons Library Briefing, 21 November 2018, at 4, <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8443> [Accessed 27 Sep. 2019].

(2) *Id.*

(3) *Id.*

(4) Article 12 of the Statute; Preconditions to the exercise of jurisdiction

“1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

question is finding evidence that at least one element of a crime falls within the jurisdiction of the court, according to article 5 of the Statute⁽⁵⁾. In mid-September 2018, the ICC prosecutor opened a file of evidence and later, in July 2019, a formal investigation into the Rohingya in Bangladesh was requested as part of the Myanmar crisis.

This research paper attempts to show that the challenges that hold the ICC back from reaching its potential in addressing the Rohingya crisis include issues of the jurisdiction of the court, issues related to the court's systemic weaknesses or technical procedures, and issues related to the world's politics and economics. The goal of this paper is to develop a comprehensive understanding of how the ICC works to address the Rohingya crisis within the overall political chaos, outside the formality of the ICC.

Additionally, this paper draws attention to the alternate paths within the international order of holding the Myanmar government to account. To do so, this paper presents a description of the legal texts and written rules of the Statute and explains how these texts and rules are meant to be implemented by the drafters of the Statute.

In addition, the legal texts of the Statute concerning the working system of the ICC and its jurisdiction will be evaluated to determine the ICC's validation or effectiveness to address transnational problems. Further, this paper will rely on the provided facts and actual patterns collected from reports and video-recorded conferences. These facts will be used to test the real-life existence or absence of the application of the Statute's texts and rules concerning the ICC role, powers, and jurisdiction. Again, this study aims to prove the influence of the politics and economics on the application of the written rules and legal texts.

This paper attempts to add to the literature on the ICC jurisdiction and to advance the studies in the field of the application of international law in times of human degradation.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9. Rome Statute of the International Criminal Court, ICC, <https://www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf> [Accessed 29 Oct. 2019].

(5) Article 5 of the Statute; Crimes within the jurisdiction of the Court
“The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression”.

Id., p.3.

This paper has five parts. The first part is this introduction, which contains a brief explanation of the Rohingya humanitarian crisis and the international community's reaction to it, the research questions and objectives, the impact of this research on the field, a description of the research plan, and the undertaken research approach. The second part is a background section that describes the development of the Rohingya crisis. The third part explains and evaluates the ICC system. The third part is divided into two sections. The first section provides a description of the role, powers, and jurisdiction of the ICC. The second section of the third part highlights the current system's defects and weaknesses. The fourth part is about the challenges to the ICC jurisdiction over the Rohingya crisis. The fourth part is divided into three sections. The first section will identify how the legal challenges regarding the ICC jurisdiction relate to the Rohingya crisis. The second section will explore the political and economic challenges that prevent the ICC from effectively addressing the Rohingya problem. The third section will uncover alternate, yet legitimate, paths that could be undertaken to overcome the challenges the ICC encounters in addressing the crisis. The fifth part is the conclusion.

In short, this paper is divided into five parts. Part I, the introduction; part II, the Rohingya crisis: the context and background; part III, the ICC system; part IV, challenges to the ICC jurisdiction over the Rohingya crisis; and part V, the conclusion.

II. The Rohingya Crisis: The Context and Background

On 25 August 2017, the authorities in Myanmar started clearance operations against the entire Rohingya population⁽⁶⁾. As a result of these operations, nearly 725,000 Rohingya, who are a Muslim minority, had fled from Rakhine, Myanmar, to Bangladesh by mid-August 2018⁽⁷⁾. The operations included raping and sexually assaulting women, burning villages, killing, depriving the civilians of food and water, and blocking medicine from reaching victims⁽⁸⁾.

The government of Myanmar justified the operations of Myanmar's security forces against the Rohingya by claiming that these acts constitute a lawful counterterrorism measure taken against the Arakan Rohingya Salvation Army

(6) Report of the independent international fact-finding mission on Myanmar, OHCHR, 12 September 2018, at 8, paras. 32-33, https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_64.pdf [Accessed 30 Jul. 2019].

(7) *Id.*

(8) Engy Abdelkader, *Are Myanmar's Rohingya Facing Genocide?* Columbia Journal of Transnational Law, <http://jtl.columbia.edu/are-myanmars-rohingya-facing-genocide/> [Accessed 30 Jul. 2019].

(ARSA), an insurgency group, as a response to their attacks on a military base⁽⁹⁾.

The UN Fact-Finding Mission on Myanmar urged that the situation in Myanmar be referred to the International Criminal Court⁽¹⁰⁾. In a statement, the ICC Prosecutor Mrs. Fatou Bensouda disclosed that her Office has received several communications and reports concerning the deportation of the Rohingya people to Bangladesh as well as crimes committed against them inside Myanmar⁽¹¹⁾. Accordingly, the Prosecutor filed her request to the Pre-Trial Chamber, seeking a ruling on the question of whether the court may exercise jurisdiction pursuant to article 12(2)(a) of the Rome Statute over the alleged deportation of members of the Rohingya people from Myanmar to Bangladesh⁽¹²⁾.

The Pre-Trial Chamber, while preparing the Decision on the Prosecution's Request for a Ruling on Jurisdiction⁽¹³⁾, invited both the governments of Myanmar⁽¹⁴⁾ and Bangladesh⁽¹⁵⁾ to file submissions regarding their opinions on the Prosecutor's Request. Diplomatic and consular representatives of Myanmar declined the servicing of that invitation⁽¹⁶⁾. However, on 9 August 2018, the

(9) *Id.* See also, Report of the independent international fact-finding mission on Myanmar, *supra* note 6, at 8 paras. 32-33.

(10) UN report, Myanmar: Tatmadaw leaders must be investigated for genocide, crimes against humanity, war crimes, OHCHR, 27 August 2018, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23475&LangID=E> [Accessed 30 Jul. 2019].

(11) Statement of ICC Prosecutor, Fatou Bensouda, on opening a Preliminary Examination concerning the alleged deportation of the Rohingya people from Myanmar to Bangladesh, ICC-OTP, 18 September 2018, <https://www.icc-cpi.int/Pages/item.aspx?name=180918-otp-stat-Rohingya> [Accessed 31 Jul. 2019].

(12) Application under regulation 46(3), Prosecution's request for a ruling on jurisdiction under article 19(3) of the Statute, ICC, 9 April 2018, https://www.icc-cpi.int/CourtRecords/CR2018_02057.PDF [Accessed 31 Jul. 2019].

(13) Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute," ICC, 6 September 2018, https://www.icc-cpi.int/CourtRecords/CR2018_04203.PDF [Accessed 31 Jul. 2019].

(14) Decision Inviting the Competent Authorities of the Republic of the Union of Myanmar to Submit Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute," ICC, 21 June 2018, https://www.icc-cpi.int/CourtRecords/CR2018_03206.PDF [Accessed 31 Jul. 2019].

(15) Decision Inviting the Competent Authorities of the People's Republic of Bangladesh to Submit Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute," ICC, 7 May 2018, https://www.icc-cpi.int/CourtRecords/CR2018_02487.PDF [Accessed 31 Jul. 2019].

(16) Registry's Report on the implementation of the Decision Inviting the Competent Authorities of the Republic of the Union of Myanmar to Submit Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute," ICC, 5 July 2018, https://www.icc-cpi.int/CourtRecords/CR2018_03571.PDF [Accessed 31 Jul. 2019].

Myanmar authorities published a Statement addressing the proceedings of the ICC⁽¹⁷⁾. In this Statement, Myanmar authorities emphasized that “Myanmar is not party to the Rome Statute and the Court has no jurisdiction on Myanmar whatsoever”⁽¹⁸⁾.

Also the Statement acknowledged that “Myanmar has declined to engage with the ICC by way of a formal reply”⁽¹⁹⁾. After that, the Prosecutor filed a “Notice of the Public Statement Issued by the Government of Myanmar”⁽²⁰⁾. In this notice, the Prosecutor asked the judges of the Pre-Trial Chamber not to take Myanmar’s public Statement into their consideration when deciding the jurisdiction of the court over the Rohingya crisis⁽²¹⁾. The Prosecutor described Myanmar’s Public Statement as “inaccurate in its understanding of these proceedings, and in the legal conclusions it purports to draw”⁽²²⁾.

The Pre-Trial Chamber I of the ICC decided, on 6 September 2018, that the court may exercise jurisdiction over the deportation pursuant to article 12(2) (a) of the Statute “if at least one element of a crime within the jurisdiction of the Court [...] is committed on the territory of a State Party to the Statute”⁽²³⁾. Furthermore, the ICC elaborates on the potential to try other crimes that have been perpetrated against the Rohingya people and that constitute crimes against humanity under article 7 of the Rome Statute⁽²⁴⁾.

After this, the ICC Prosecutor Mrs. Bensouda, on 18 September 2018, announced the opening of a preliminary examination regarding the issue, so that she could decide the merit of proceeding to the investigation phase⁽²⁵⁾. The preliminary examination requires examining the available information⁽²⁶⁾. Therefore, an informed determination can be made regarding whether there is a reasonable basis to proceed with an investigation pursuant to the criteria established by the Rome Statute⁽²⁷⁾, specifically under article 53(1) of the

(17) Press Release, Government of Myanmar, Ministry of the Office of the State Counsellor, 9 August 2018, <http://www.president-office.gov.mm/en/?q=briefing-room/statements-and-releases/2018/08/09/id-8937> [Accessed 31 Jul. 2019].

(18) *Id.*

(19) *Id.*

(20) Notice of the Public Statement Issued by the Government of Myanmar, ICC, 10 June 2010, https://www.icc-cpi.int/CourtRecords/CR2018_04048.PDF [Accessed 31 Jul. 2019].

(21) *Id.*

(22) *Id.*

(23) Decision on the “Prosecution’s Request, *supra* note 13, at 42 para. 72.

(24) Statement of ICC Prosecutor, *supra* note 11.

(25) *Id.*

(26) *Id.*

(27) *Id.*

Rome Statute⁽²⁸⁾. Issues of jurisdiction, admissibility and the interests of justice are focal in making the decision whether to proceed with an investigation⁽²⁹⁾. On 4 July 2019, the ICC Prosecutor Mrs. Bensouda requested the Pre-Trial Chamber III to authorize the commencement of an investigation into the situation in Bangladesh/Myanmar⁽³⁰⁾.

The Prosecutor justified the ICC jurisdiction over the Rohingya crisis on several grounds, including the international law *jus cogens*, such as the violation of the Rohingyas' right to return to Myanmar, a customary international law principle that guarantees the right of displaced persons to return safely to their state of origin with which they preserve a close connection⁽³¹⁾.

However, this paper will only be concerned with the territorial principle, since the ICC built its jurisdiction over the deportation of the Rohingya upon the principle of territoriality and particularly in accordance with article 12(2) (a) of the Statute and since the Statute is silent on the question of the ICC's territorial jurisdiction under article 12(2)(a.) The ICC also observed that it had not previously interpreted this provision contained in article 12(2)(a)⁽³²⁾. Thus, the court, in its interpretation of the provision of article 12(2)(a) and any relevant provisions of the Statute, should consider the application of public international law rules and principles, including general principles of law⁽³³⁾. However, before proceeding with our analysis of the main subject matter of this paper, an informed understanding of the ICC system is required because the provisions contained in the Statute are essential for explaining later how the interplay between these provisions and the facts or the circumstances of the contested issue may affect the extent of the ICC jurisdiction over the transnational crimes in general and the crime of the deportation of the Rohingya in particular.

III. The International Criminal Court (ICC)

The ICC is an international tribunal established by the Rome Statute in 1998. The Statute entered into force in 2002. As of August 2019, 122 countries are States Parties to the Statute and thereby accept the jurisdiction of the ICC

(28) Id.

(29) Id.

(30) Request for authorisation of an investigation pursuant to article 15, ICC-OTP, 4 July 2019, https://www.icc-cpi.int/CourtRecords/CR2019_03510.PDF [Accessed 31 Jul. 2019].

(31) Id., at 40 para. 75 and 71 para. 139.

(32) Michail Vagias, Case No. ICC-RoC46(3)-01/18, American Journal of International Law, volume 113, issue 2, 368-375, at 371 (2019).

(33) Michail Vagias, The Territorial Jurisdiction of the International Criminal Court: certain contested issues, at 22 para. 2.1 (Ph.D. Thesis, Leiden University) (Bynkers Hoek 2011).

pursuant to article 12(1) of the Statute⁽³⁴⁾. Nevertheless, several powerful states have failed to join the ICC such as China, Russia, and the United States⁽³⁵⁾.

The first section of this part illustrates the role, powers, and jurisdiction of the ICC. The second section evaluates the ICC system.

A. Role, Powers, and Jurisdiction of the ICC

1. The Role of the ICC

The ICC's ultimate objective is to hold to account individuals who are mainly responsible for the most serious international crimes that violate the common values of humanity. The crimes that fall under the jurisdiction of the court are genocide, war crimes, crimes against humanity, and the crime of aggression. Furthermore, the ICC aims to help prevent these crimes from happening again, as part of its vision for a lasting peace⁽³⁶⁾.

2. The Powers of the ICC

According to article 4 of the Statute, the ICC enjoys international legal personality that enables the court to exercise its functions and fulfil its purposes on the territories of States Parties. Additionally, according to article 48 of the Statute, the ICC enjoys privileges and immunities that are necessary for the fulfilment of its purposes on the territories of States Parties.

However, according to parts 9 and 10 of the Statute, the ICC does not own the capacity to function or enforce its decisions without States Parties' cooperation and judicial assistance. The need for States Parties' assistance can be seen clearly during the investigation phase, which requires the States Parties to enable investigators to safely enter the conflict area and conduct interviews with victims and witnesses. Additionally, the court needs the States Parties' cooperation regarding the execution of arrest warrants, the surrender of suspects to the court, and the protection of witnesses and victims who are requested to testify before the court. Further, States Parties' cooperation is necessary to enforce the court's sentences of imprisonment, fines, and forfeiture. Furthermore, the ICC depends for its financing on contributions of States Parties and voluntary contributions from governments, international organizations, individuals, corporations, and other entities⁽³⁷⁾.

(34) The States Parties to the Rome Statute, ICC-ASP, https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx [Accessed 27 Sep. 2019].

(35) *Id.*

(36) About the International Criminal Court, ICC, <https://www.icc-cpi.int/about> [Accessed 27 Sep. 2019].

(37) Rome Statute, *supra* note 4, articles 115 and 116.

3. The Jurisdiction of the ICC

For a case to be admissible before the ICC, the court should decide that it has jurisdiction over this case. In other words, the court itself shall announce that it is the competent institution to adjudicate the case⁽³⁸⁾. To do so, the court shall satisfy all the requirements, spelled out in part 2 of the Statute, regarding the initiation of the proceedings⁽³⁹⁾, the temporal jurisdiction of the court⁽⁴⁰⁾, the crimes within the jurisdiction of the ICC⁽⁴¹⁾, and the principle of complementarity⁽⁴²⁾.

Article 13 of the Statute describes three exclusive means for triggering the court jurisdiction regarding a matter. First, there is the referral to the Prosecutor by a State Party. This was the case for Uganda, Mali, the Democratic Republic of the Congo, and Central African Republic in both 2004 and 2014⁽⁴³⁾. Second, there is the referral to the Prosecutor by the United Nations Security Council, acting under Chapter VII of the Charter of the UN. This was the case for Darfur and Libya⁽⁴⁴⁾. Third, there is the initiation of an investigation by the Prosecutor acting on his or her own initiative after the authorization of the judges. This was the case with respect to the situations in Kenya, Côte d'Ivoire, and Georgia⁽⁴⁵⁾.

States that are not parties to the Statute may, exceptionally, refer situations to the ICC in three cases. First, there is a case if the parties grant the court an acceptance of jurisdiction on an *ad hoc* basis pursuant to article 12(3) of the Statute. This was the case for Côte d'Ivoire, when it accepted the Court's jurisdiction in 2003 while it was not yet a State Party⁽⁴⁶⁾. Second, there is a

(38) Rome Statute, *supra* note 4, article 19 (1).

(39) Rome Statute, *supra* note 4, article 13.

(40) Rome Statute, *supra* note 4, article 11.

(41) Rome Statute, *supra* note 4, article 5.

(42) Rome Statute, *supra* note 4, article 17.

(43) Examples of State Parties referral to the ICC include: Situation in Uganda, ICC-02/04, <https://www.icc-cpi.int/uganda> [Accessed 27 Sep. 2019]. See Also, Situation in the Republic of Mali, ICC-01/12, <https://www.icc-cpi.int/mali> [Accessed 27 Sep. 2019]. See also, Situation in the Democratic Republic of the Congo, ICC-01/04, <https://www.icc-cpi.int/drc> [Accessed 27 Sep. 2019]. See also, Situation in the Central African Republic, ICC-01/05, <https://www.icc-cpi.int/car> [Accessed 27 Sep. 2019]. And, Situation in Central African Republic II, ICC-01/14, <https://www.icc-cpi.int/carII> [Accessed 27 Sep. 2019].

(44) Situation in Darfur, Sudan, ICC-02/05, <https://www.icc-cpi.int/darfur> [Accessed 27 Sep. 2019]. See also, Situation in Libya, ICC-01/11, <https://www.icc-cpi.int/libya> [Accessed 27 Sep. 2019].

(45) Situation in the Republic of Kenya, ICC-01/09, <https://www.icc-cpi.int/kenya> [Accessed 27 Sep. 2019]. See also, Situation in Côte d'Ivoire, ICC-02/11, <https://www.icc-cpi.int/cdi> [Accessed 27 Sep. 2019]. And, Situation in Georgia, ICC-01/15, <https://www.icc-cpi.int/georgia> [Accessed 27 Sep. 2019].

(46) *Id.*

case when the person accused of the crime is a national of a State Party or a State that accepted the jurisdiction of the court according to article 12(2)(b). Third, there is a case when a part of a crime extended to a State Party territory according to article 12(2)(a).

Paragraphs 2 and 3 of article 12 of the Statute demonstrate that the jurisdiction of the ICC is not universal. Rather, the jurisdiction of the court should rely either on a personal or territorial basis⁽⁴⁷⁾.

According to article 11 of the Statute concerning the ICC's temporal jurisdiction⁽⁴⁸⁾, the court does not have jurisdiction over offences committed before the entry into force of the Statute on 1 July 2002. If a State becomes a party to the Statute after its entry into force, the court may exercise jurisdiction only with respect to crimes committed after the Statute has entered into force for that State. The State may however make a declaration of acceptance to allow the exercise of jurisdiction by the court with respect to crimes committed between 1 July 2002, the date of entry into force of the Statute, and the date the Statute entered into force for the State.

The jurisdiction of the ICC is limited to “the most serious crimes of concern to the international community as a whole”⁽⁴⁹⁾. These crimes include genocide, crimes against humanity, war crimes, and aggression⁽⁵⁰⁾. The Statute and Elements of Crimes provide a comprehensive explanation of each of these crimes, such as their definitions, material and mental elements, and the acts that constitute these crimes⁽⁵¹⁾.

The ICC jurisdiction system is guided by the principle of complementarity, as provided for in article 17 of the Statute. This principle means that the ICC can only exercise its jurisdiction if the ICC decided, in accordance with the rules in article 17(2) of the Statute, that the national courts are genuinely unwilling or unable to investigate and prosecute crimes within the ICC's jurisdiction⁽⁵²⁾.

(47) Malcolm N. Shaw, *International law*, PDF, at 290 (Cambridge University Press 7 ed.) (2014).

(48) Rome Statute, *supra* note 4, article 11.

(49) Rome Statute, *supra* note 4, article 5.

(50) *Id.*

(51) Rome Statute, *supra* note 4, articles 5,6,7,8, and 9. Also, *Elements of Crimes*, ICC, <https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf> [Accessed 4 Aug. 2019].

(52) Rome Statute, *supra* note 4, article 17(2) “...2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

The objective of such a principle, as provided for in the Preamble and article 1 of the Statute, is to reaffirm state sovereignty, particularly regarding the state fundamental right and responsibility to exercise its own criminal jurisdiction over international crimes.

Although the complementarity principle is an issue of admissibility to be examined by the judges when determining whether to adjudicate a case, it is also an issue that the Prosecutor must consider when deciding whether to open an investigation or to prosecute⁽⁵³⁾.

B. Evaluation of the ICC System

This section identifies the systemic and jurisdictional limitations in the Rome Statute's system that prevent the ICC from effectively carrying out international criminal justice.

The evaluation points include the core critiques of the system that are considered key factors in determining the court's success⁽⁵⁴⁾. These points are the limited financial resources of the ICC, the ICC's reliance on international cooperation and support, the ICC's slow and lengthy procedures, the ICC's role in persecuting individuals, and the ICC's strict jurisdiction regime.

1. The Limited Financial Resources of the ICC

As previously mentioned, the ICC lacks independency regarding its finances and resources. The court cannot function and achieve its purpose unless funds are made available to it by States Parties and other external bodies⁽⁵⁵⁾. These financing difficulties reflect the limited number of cases the court can accept and the limited scope and lengthy investigations the court has undertaken⁽⁵⁶⁾. Therefore, the court should use its limited resources carefully and wisely⁽⁵⁷⁾.

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. "In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings".

(53) Sydney Conference, Complementary in International Criminal Law, International Law Association, 2018, at 2, http://www.ila-hq.org/images/ILA/DraftReports/DraftReport_Complementarity.pdf [Accessed 27 Sep. 2019].

(54) Performance Debate - How can the performance of the ICC be properly assessed?, ICC Forum, <https://iccforum.com/performance> [Accessed 29 Sep. 2019].

(55) Rome Statute, *supra* note 4, article 116.

(56) Performance Debate, *supra* note 54. See also, Strategic Plan 2019-2021, ICC-OTP, 17 July 2019, at 10, <https://www.icc-cpi.int/itemsDocuments/20190726-strategic-plan-eng.pdf> [Accessed 29 Sep. 2019].

(57) *Id.*

In this regard, the Prosecutor emphasizes the importance of establishing a two-tier strategy to combat impunity and to overcome the ICC's financial difficulties at the same time. This strategy is, first, to focus the efforts of the ICC on investigating and prosecuting the leaders who bear the most responsibility for the crimes, as a general rule. Second, the strategy is to encourage national prosecutions of low-ranking perpetrators or to find other means of holding them accountable with the help of the international community⁽⁵⁸⁾.

2. The ICC's Reliance on International Cooperation and Support

State Parties play a significant role in enabling the ICC to conduct its operations and activities. They have an obligation to cooperate fully with the ICC in its investigation and prosecution⁽⁵⁹⁾. State Parties also obliged to adjust their national law to facilitate the cooperation with the court⁽⁶⁰⁾. Examples of cooperation include providing information, protecting victims and witnesses, making arrests, and extraditing criminals⁽⁶¹⁾.

However, States Parties may deny an ICC's request for cooperation on two grounds. First, they may deny the request if it conflicts with a national existing fundamental legal principle of general application⁽⁶²⁾. Second, they may deny the request if it concerns the production of documents or the disclosure of evidence that relate to the national security of the State Party⁽⁶³⁾. Additionally, States Parties may postpone the execution of the request for two reasons. First, the States Parties may postpone if the immediate execution of the request would interfere with an ongoing investigation or prosecution of another case⁽⁶⁴⁾. Second, the States Parties may postpone if there is an admissibility challenge pending before the Court⁽⁶⁵⁾.

Further, the ICC may not proceed with a request for surrender or assistance that conflicts with the requested State's obligations towards a third State, such

(58) Paper on some policy issues before the Office of the Prosecutor, September 2003, at 3, https://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf [Accessed 29 Sep. 2019]. See also, Policy paper on case selection and prioritisation, ICC-OTP, 15 September 2016, at 4, 5, and 6, https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf [Accessed 29 Sep. 2019]. See also, Policy Paper on the Interests of Justice, ICC-OTP, September 2007, at 7, <https://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIterestsOfJustice.pdf> [Accessed 29 Sep. 2019].

(59) Rome Statute, supra note 4, article 86.

(60) Rome Statute, supra note 4, article 88.

(61) Rome Statute, supra note 4, article 89, 90, 91, 92, and 93.

(62) Rome Statute, supra note 4, article 93(3).

(63) Rome Statute, supra note 4, article 93(4).

(64) Rome Statute, supra note 4, article 94(1).

(65) Rome Statute, supra note 4, article 95.

as the diplomatic immunity of a person or property of a third State, unless the court can first obtain the consent to cooperate from that third State, such as a waiver of the immunity⁽⁶⁶⁾.

Non-States Parties, international and regional organizations as well as civil society groups such as nongovernmental groups (NGOs) are all not obliged to cooperate with the ICC under the Statute. However, they have worked with the court in numerous ways, for example, by providing information and assistance. Additionally, they have worked with the court by raising awareness and building support for the court and its mandate by arranging seminars and conferences⁽⁶⁷⁾. Further, the ICC may request non-States Parties and other entities to provide information, documents, and assistance necessary for the court's work and activities⁽⁶⁸⁾.

3. The ICC's Slow and Lengthy Procedures

Any case brought to the court's attention goes through different phases before a final decision can be made regarding the case. The first phase is a preliminary examination and may develop into the opening of an investigation by the Prosecutor. The second phase is the pretrial. During this phase, the Prosecutor will have to convince the judges of the merit of his or her findings and the warrant for the case to proceed to trial. The third phase is the trial and appeals⁽⁶⁹⁾.

Throughout all these phases, the court works in multiple languages with teams of interpreters and translators to guarantee that the defendant fully understands the proceedings of the court⁽⁷⁰⁾. Each phase involves its own distinct factual, legal, technical, and financial challenges. During the preliminary examination, the Prosecutor is required to decide whether there is a reasonable basis to initiate an investigation. To do so, the Prosecutor should collect and evaluate the information necessary to assess and verify several legal criteria concerning the jurisdiction, admissibility and interests of justice and those of the victims.

There are no deadlines under the Statute for concluding a preliminary examination. The Prosecutor decides the closing of a preliminary examination, depending on the circumstances of each situation. To conduct investigations,

(66) Rome Statute, *supra* note 4, article 98.

(67) How the Court works, ICC, <https://www.icc-cpi.int/about/how-the-court-works/Pages/default.aspx#legalProcess> [Accessed 29 Sep. 2019].

(68) Rome Statute, *supra* note 4, articles 15(2) and 44(4).

(69) About Office of the Prosecutor, ICC, <https://www.icc-cpi.int/about/otp> [Accessed 29 Sep. 2019].

(70) How the Court works, *supra* note 67.

the Prosecutor sends missions to the targeted areas to collect and examine evidence and to interview victims and witnesses. Once the Prosecutor decides that he or she has sufficient evidence that an individual is responsible for a crime within the Court's jurisdiction, the Prosecutor will request the judges to issue a warrant of arrest or a summons to appear⁽⁷¹⁾. As previously mentioned, the arrest and surrender of a suspect depends on the cooperation of the international community. The proceedings of the court will be postponed until the suspect is in the court's custody. In this regard, the ICC issued two warrants for the arrest of Omar Al Bashir on 4 March 2009 and 12 July 2010⁽⁷²⁾.

However, some States Parties to the Statute welcomed Al Bashir in their territories such as Chad, Kenya, Djibouti, Malawi, and Jordan. Similarly, some non-States Parties to the Statute welcomed Al Bashir in their territories such as Egypt, Syria, Qatar, Zimbabwe, Ethiopia, Eritrea, and Libya. On 11 April 2019, Al Bashir was arrested in Sudan, but he was not surrendered to the ICC as yet⁽⁷³⁾. As a result, the ICC's proceedings regarding the situation in Darfur remained in the pretrial stage⁽⁷⁴⁾.

4. The ICC's Role in Persecuting Individuals

Article 25(1) of the Statute articulates that the court has jurisdiction over natural persons⁽⁷⁵⁾. The ICC system holds state leaders individually liable for atrocity crimes, while the accountability of other low-ranking state officials is left to be determined by the national courts and the international community. The failure of the national courts to persecute low-ranking officials should be presumed under the complementarity principle, which is a prerequisite for the ICC to persecute state leaders and higher-ranking officials.

Therefore, under the ICC system, the low-ranking perpetrators will probably not be tried or punished by the national courts. Equivalently, the international community may not be interested in persecuting the low-ranking officials as long as the interests of the most powerful states in the world are not affected by the crimes.

(71) About Office of the Prosecutor, *supra* note 69.

(72) Situation in Darfur, Sudan, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, ICC, <https://www.icc-cpi.int/darfur/albashir> [Accessed 29 Sep. 2019].

(73) Catherine Gegout, *The International Criminal Court: limits, potential and conditions for the promotion of justice and peace*, *Third World Quarterly*, volume 34, issue 5, 800–818 (2013), at 806, <https://www.tandfonline.com/doi/abs/10.1080/01436597.2013.800737> [Accessed 29 Sep. 2019]. See also, *Twenty-Ninth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1593 (2005)*, ICC-OTP, 19 June 2019, <https://www.icc-cpi.int/itemsDocuments/190619-rep-otp-UNSC-Darfur-Sudan-ENG.pdf> [Accessed 29 Sep. 2019].

(74) *Case AlBashir*, *supra* note 72.

(75) Rome Statute, *supra* note 4, article 25.

Furthermore, under the ICC system, state leaders are fully responsible for atrocities and even though article 25(4) of the Statute determines that “no provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law”, the Statute never clarifies how State responsibility regarding the acts of its officials could be approached. Such a perception of the court conflicts with article 1 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) that determines that “every internationally wrongful act of a State entails the international responsibility of that State”⁽⁷⁶⁾.

Article 2 of ARSIWA describes the elements that constitute an internationally wrongful act of a State as “there is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State”⁽⁷⁷⁾. Chapter II of ARSIWA spells out the conditions when a conduct is attributable to the State and thus entails its international responsibility.

On many occasions, under the provided conditions, the State is deemed liable for the acts of individuals. For example, article 4(1) of ARSIWA determines that the conduct of the organs of a State shall be considered an act of that State under international law, and then article 4(2) continues that a State’s organ can be any person that has the status *State Organ* in accordance with the internal law of the State⁽⁷⁸⁾.

Furthermore, article 5 of ARSIWA decides that the conduct of a person who is empowered by the law of the State to exercise elements of governmental authority shall be considered an act of the State under international law, provided that the person is acting in that capacity in that particular instance⁽⁷⁹⁾. Moreover, article 7 of ARSIWA provides that the conduct of a person who is empowered to exercise elements of a government’s authority shall be considered an act of the State under international law if the person acts in that capacity, even if it exceeds the State’s authority or contravenes instructions⁽⁸⁰⁾.

Additionally, Article 8 specifies that “the conduct of a person or group of persons shall be considered an act of a State under international law if the

(76) Responsibility of States for Internationally Wrongful Acts 2001, article 1, http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf [Accessed 30 Sep. 2019].

(77) Id. Article 2.

(78) Id. Article 4.

(79) Id. Article 5.

(80) Id. Article 7.

person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct”⁽⁸¹⁾. Additionally, article 9 of ARSIWA considers the conduct of a person or group of persons an act of a State under international law if the person or group of persons is in fact exercising elements of the government’s authority in the absence or default of the official authorities as well as in circumstances that call for exercising those elements of authority⁽⁸²⁾.

Atrocities usually appear in societies that are socially, politically, and economically unstable, meaning that they are the result of these combined circumstances; thus, holding leaders alone accountable for mass crimes raises concerns regarding the impartiality of the court and its effectiveness in ending impunity.

5. The ICC’s Strict Jurisdiction Regime

According to article 12 of the Statute, the ICC cannot extend its jurisdiction, in accordance with the universality principle, over a crime that occurred entirely within a non-State Party’s territory unless that state has accepted the jurisdiction of the court.

Similarly, article 12 implies that the court cannot extend its jurisdiction, in accordance with the subjective territoriality principle, over the part of the transnational crime that occurred in a non-State Party’s territory unless that state has accepted the jurisdiction of the court.

Further, article 12 does not grant the court the right to extend its jurisdiction, in accordance with the passive personality principle, if the victims were nationals of a State Party or a State that accepted the court jurisdiction while the person accused of the crime was a national of a non-State Party and his or her state of nationality had not accepted the court jurisdiction.

In fact, the principal objection by the United States against the Statute since its creation has been regarding the interpretation of this point. The ICC invokes the complementarity principle to justify the extension of its jurisdiction over nationals of a non-State Party even without the consent of their state and without the situation being referred to the court by the UN Security Council. To challenge the ICC ruling in this regard, the U.S. has signed a number of bilateral non-surrender agreements with several states, including States Parties to the Statute, which shield nationals, current or former officials, or

(81) Id. Article 8.

(82) Id. Article 9.

military personnel of either party from the possibility of being surrendered or transferred by the other state to the ICC⁽⁸³⁾.

In connection with this, after the Prosecutor's decision to open an investigation into the situation in Afghanistan that may have placed American citizens under the ICC's jurisdiction, the U.S. asserted in a Statement that the ICC attitude in this regard contradicts with a fundamental principle of international law that a treaty is binding only on its parties and that the treaty does not create obligations for nonparties without their consent⁽⁸⁴⁾.

By contrast to the provisions of article 12, the ICC has only two options to extend its jurisdiction over transnational crimes that involve non-States Parties. These options are either the active personality principle or the objective territoriality principle. The ICC has jurisdiction in accordance with the active personality principle only if the state of the nationality of the accused accepts the court's jurisdiction. The ICC has jurisdiction in accordance with the objective territoriality principle if part of the crime extended to a state party's territory: in this case, the court will have jurisdiction only over the part of the crime that occurred in the territory of the State Party.

In the coming part, I will explain how the ICC's strict jurisdiction system has proceeded in addressing the Rohingya crisis. Additionally, I will identify the political and economic challenges for the jurisdiction of the court. In addition, I will propose different ways to overcome all the systemic, legal, political, and economic barriers.

IV. Challenges to ICC's Jurisdiction over the Rohingya Crisis

As mentioned in the previous part, the ICC faces systemic challenges to address the Rohingya crisis. Challenges related to the jurisdiction of the court have also been observed. This part is divided into three sections. The first section is particularly concerned with exploring the legal challenges that the court has encountered regarding the extension of its jurisdiction over the Rohingya crisis. The second section identifies the political and economic challenges preventing the court from addressing the crisis. The third section provides ways to overcome all the challenges and to thus bring all those who are responsible for the crimes against the Rohingya to justice.

(83) Malcolm N. Shaw, *supra* note 47, at 630.

(84) Statement on Behalf of the United States of America, 16th Session of the Assembly of States Parties, 8 December 2017, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ASP-16-USA.pdf [Accessed 30 Sep. 2019].

A. Legal Challenges Concerning the ICC Jurisdiction and the Deportation of the Rohingya

This section highlights some of the vocal legal bases invoked by the Pre-Trial Chamber to justify the jurisdiction of the ICC over the alleged deportation of the Rohingya. These legal bases include the territorial jurisdiction of the court pursuant to Article 12(2)(a) of the Statute and the principle of *la compétence de la compétence* pursuant to article 119(1) and article 21(1)(b) of the Statute⁽⁸⁵⁾. This section also analyses how each of these legal bases is controversial, erroneous, inappropriate, irrelevant, and inapplicable to the present situation of the Rohingya.

1. The Territorial Jurisdiction of the Court Pursuant to Article 12(2)(a) of the Statute

The Pre-Trial Chamber I affirmed the opinion of the Prosecutor that even though the coercive acts relevant to the deportation of the Rohingya were committed in the territory of Myanmar, which is not a party to the Statute, the court may still exercise territorial jurisdiction under article 12(2)(a) of the Statute, because an essential legal element of the crime of deportation-crossing an international border-occurred in the territory of Bangladesh, which is a party to the Rome Statute⁽⁸⁶⁾.

Applying the provisions of article 12(2)(a) of the Statute on the deportation of the Rohingya will require first an analysis of the elements of the war crimes and crimes against humanity. Thus, deciding the nature of the crime of deportation. If it counts as one of the crimes that the ICC has jurisdiction over according to article 5 of the Statute, whether it is a war crime or a crime against humanity, a determination of the applicability of the principle of territoriality, whether subjective or objective, as a basis for the jurisdiction of the court would be necessary to determine the extent of the ICC jurisdiction.

An essential element of the crime of deportation is crossing international borders⁽⁸⁷⁾. This element is also important for differentiating between the crime of deportation and forcible transfer, which are totally different crimes, even though both are crimes mentioned in article 7(1)(d) of the Statute and

(85) Decision on the “Prosecution’s Request, supra note 13.

(86) Press Release, ICC Pre-Trial Chamber I rules that the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh, 6 September 2018, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1403> [Accessed 4 Aug. 2019].

Rome Statute, supra note 4, articles 12(2) and 3. See also, Prosecution’s request for a ruling on jurisdiction, supra note 12, at 3 para. 2.

(87) Prosecution’s request for a ruling on jurisdiction, supra note 12, at 7 para. 13.

both require the enforced displacement of individuals⁽⁸⁸⁾. However, forcible transfer does not require crossing international borders, but it does require the transfer of the population from the place where it originally resides to another place within the same territory⁽⁸⁹⁾.

In this connection, the ICTY jurisprudence emphasizes the distinction between these two crimes in regard to their legal elements by stating that "...while forcible transfer may be carried out within national borders, for the crime of deportation the displacement of the persons must be across a *de jure* border between two States or, in certain circumstances, a *de facto* border"⁽⁹⁰⁾. Since the conflict between Myanmar's security forces and (ARSA) broke out from the territory of Myanmar to the territory of the neighboring state of Bangladesh, the situation between Myanmar/Bangladesh exactly fits the criteria of the crime of deportation⁽⁹¹⁾.

Another important distinction that should be made here is regarding international and noninternational armed conflict. An armed conflict is characterized as international when it takes place between the troops or governments of two or more states⁽⁹²⁾. Additionally, an armed conflict may be characterized as international if it started as an internal conflict and then became international, for example, if the troops of another state somehow became engaged in that conflict⁽⁹³⁾. The violence between Myanmar's security forces and (ARSA) that caused the deportation started and continued between groups belonging to Myanmar. The forces of Bangladesh were never involved

(88) *Id.*, at 7-8 paras. 13-15-16.

(89) *Id.*, at 8 paras. 15-16.

(90) Judgement Popovic et al, Case No.IT-05-88-T, ICTY, 10 June 2010, at 353 para. 892, <http://www.icty.org/x/cases/popovic/tjug/en/100610judgement.pdf> [Accessed 1 Aug. 2019].

(91) Prosecution's request for a ruling on jurisdiction, *supra* note 12, at 8-9 para. 16

(92) In this regard, the trial chamber in Mucic et al. "Čelebići Camp," stated that:

"In its adjudication of the nature of the armed conflict with which it is concerned, the Trial Chamber is guided by the Commentary to the Fourth Geneva Convention, which considers that "[a]ny difference arising between two States and leading to the intervention of members of the armed forces" is an international armed conflict and "[i]t makes no difference how long the conflict lasts, or how much slaughter takes place."

Judgement Mucic et al. "Čelebići Camp," et al Case No. IT-96-21-T, ICTY, 16 November 1998, at 79 para. 208, http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf [Accessed 1 Aug. 2019].

(93) The Appeals Chamber in Duško Tadić «Prijedor,» held that:

«It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.»

Judgement Duško Tadić «Prijedor,» Case No. IT-94-1-A, ICTY, 15 July 1999, at 34 para. 84, <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf> [Accessed 1 Aug. 2019].

in the fighting, even after the conflict broke out from the borders of Myanmar to the borders of Bangladesh. Accordingly, the situation between Myanmar/Bangladesh constitutes non international armed conflict⁽⁹⁴⁾.

Notably, the descriptions of internal, international as well as noninternational conflict are of the conflict and not of the crime of deportation. When we describe a conflict as noninternational or internal, this means that the conflicting groups belong to one state, whether their conflict remains within the borders of that state or whether it crosses the borders to another state. Therefore, the description of noninternational armed conflict refers to the nature of the conflict that is between the parties from the same state of Myanmar.

The Prosecutor sought a ruling on the court's jurisdiction under article 12(2) (a) of the Statute; specifically, to argue that the court has jurisdiction when persons are directly deported from the territory of a state that is not a party to the Statute into the territory of a state that is a party to the Statute⁽⁹⁵⁾. The alleged deportation of Rohingya occurred from the territory of Myanmar to the territory of Bangladesh. Bangladesh ratified the Rome Statute on 23 March 2010. The ICC may, therefore, exercise its jurisdiction over any crime listed in the Statute and committed on the territory of Bangladesh, starting from 1 June 2010, the date that the Statute had entered into force for Bangladesh⁽⁹⁶⁾. However, Myanmar is not a State Party to the Rome Statute and it did not accept the ICC jurisdiction⁽⁹⁷⁾.

A deportation may constitute, under the Statute, either a war crime under article 8(2)(a)(vii) or a crime against humanity under article 7(1)(d)⁽⁹⁸⁾. Additionally, deportation may not constitute a war crime or crime against humanity if the elements of neither crime have been fulfilled. In sum, if the deportation of the Rohingya counts as a war crime or crime against humanity, the ICC would exercise jurisdiction over the crime of deportation. If the deportation of the Rohingya does not count as a war crime or a crime against humanity, the ICC would not have jurisdiction over the deportation.

Elements of the war crime of unlawful deportation and transfer according to article 8(2)(a)(vii) of the Statute are as follows: “1. The perpetrator deported or transferred one or more persons to another state or to another location; 2.

(94) Report of the independent international fact-finding mission on Myanmar, *supra* note 6, at 4 para. 10

(95) Prosecution's request for a ruling on jurisdiction, *supra* note 12, at 3 para. 4.

(96) Preliminary examination Bangladesh/Myanmar, ICC, <https://www.icc-cpi.int/bangladesh-myanmar> [Accessed 1 Aug. 2019].

(97) *Id.*

(98) Vincent Chetail, *Is There any Blood on my Hands? Deportation as a Crime of International Law*, *Leiden Journal of International Law*, volume 29, 917-943 (2016).

Such a person or persons were protected under one or more of the Geneva Conventions of 1949; 3. The perpetrator was aware of the factual circumstances that established that protected status; 4. The conduct took place in the context of and was associated with an international armed conflict; 5. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict⁹⁹.

By reviewing the circumstances associated with the deportation of the Rohingya people from Myanmar to Bangladesh¹⁰⁰, most of the previous elements of war crimes apply to the case except for one essential element: that is, that war crimes must be committed in the context of an international armed conflict. The deportation of the Rohingya did not occur in the context of an international armed conflict, as surveyed earlier, since the conflicting groups belong to the same state of Myanmar. Additionally, even when the conflict moved to Bangladesh, government of Bangladesh did not engage in that conflict by any means.

Therefore, the deportation does not constitute a war crime. Thus, the ICC is not entitled to investigate or prosecute the deportation of the Rohingya unless the court could prove that the requirements contained in article 7(1)(d) of the Statute for crimes against humanity have been met.

Elements of the crime against humanity of deportation or forcible transfer of population according to article 7(1)(d) of the Statute are as follows: “1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another state or location, by expulsion or other coercive acts; 2. Such a person or persons were lawfully present in the area from which they were so deported or transferred; 3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence; 4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population; 5. The perpetrator knew that the conduct was a part of, or intended the conduct to be a part of, a widespread or systematic attack directed against a civilian population¹⁰¹”.

All of the elements of the crimes against humanity contained in article 7(1)(d) of the Statute apply to the deportation of the people of Rohingya. The government of Myanmar, without any acceptable justification under

(99) Elements of Crimes, *supra* note 51, at 11.

(100) Report of the independent international fact-finding mission on Myanmar, *supra* note 6. See also, Rohingya Report Launch, Press Conference, PILPG, <https://www.publicinternationallawandpolicy-group.org/report-media-coverage> [Accessed 4 Aug. 2019].

(101) Elements of Crimes, *supra* note 51, at 4-5.

international law, forcibly deported the people of Rohingya from the place where they lawfully resided in Rakhine, Myanmar, to Bangladesh.

The Public International Law and Policy Group (PILP) investigation team as well as the Rohingya people who fled Rakhine and became refugees in the camps in Bangladesh both reported the violence perpetrated against the people of Rohingya by their government when they were in Rakhine and while fleeing⁽¹⁰²⁾.

Examples of the horrible crimes committed by Myanmar forces against the people of Rohingya include taking babies from their mothers' hands and throwing them into the fire or the river and shooting civilians while they were trying to flee.⁽¹⁰³⁾ The Myanmar government announced that it is conducting clearance operations against the Rohingya⁽¹⁰⁴⁾.

Moreover, the non-Rohingya population who lived in the same geographical area together with the Rohingya was not harmed by the Myanmar forces⁽¹⁰⁵⁾. A highly organized campaign or a pattern of crimes was clearly directed against the civilian population of Rohingya⁽¹⁰⁶⁾.

Further, the crimes perpetrated against the Rohingya were associated with a repetition of other criminal acts such as murder, torture, and other inhuman offences. Therefore, the attacks were apparently systematic. The term "widespread" means that the attacks targeted a large number of individuals⁽¹⁰⁷⁾. By looking at the factual circumstances of the case, the violations targeted the entire Rohingya population. Therefore, the deportation of the Rohingya constitutes a crime against humanity, and the ICC may extend its jurisdiction over this crime.

In conclusion, the enforced displacement of the Rohingya people from Myanmar to Bangladesh is a deportation resulting from a noninternational armed conflict and constitutes a crime against humanity that fits the characteristics provided in article 7(1)(d) of the Statute, and thus the ICC may exercise its jurisdiction over the crime since crimes against humanity are among the crimes that are mentioned in article 5 of the Statute that specifies the crimes that fall within the ICC jurisdiction.

(102) Rohingya Report Launch, Press Conference, PILPG, *supra* note 100

(103) *Id.*

(104) *Id.*

(105) *Id.* See, Prosecution's request for a ruling on jurisdiction, *supra* note 12, at 6. See also, Request for authorisation, *supra* note 30, at 89-90 para. 174.

(106) Vincent Chetail, *supra* note 98, at 931-933.

(107) *Id.*

However, what is the nature of the territorial jurisdiction granted to the court under article 12(2)(a) in the case of the deportation of the Rohingya? In other words, in accordance with which basis of territoriality could the court claim its criminal jurisdiction over the deportation of the Rohingya? Answering this question is also essential for determining which crimes associated with the deportation of the Rohingya the ICC will have the jurisdiction to investigate and try.

To explain, if the ICC jurisdiction were granted according to the subjective principle of territoriality, the court cannot investigate or try the crimes initiated and concluded inside Myanmar. Similarly, the court cannot investigate or try the crimes initiated inside Myanmar, even if the effect of those crimes extended to Bangladesh. Alternatively, the objective principle of territoriality, also known as “the effect doctrine,” gives the ICC jurisdiction over the crimes initiated inside Myanmar but concluded in Bangladesh or extended to Bangladesh.

For example, according to the objective principle, the ICC will not have jurisdiction over the killing that occurred within Myanmar borders and did not threaten the security of Bangladesh; however, the ICC will have jurisdiction over the burning of the villages of the Rohingya people inside Myanmar because the result of that burning extended to Bangladesh’s territory and Bangladesh, as a result of the burning, had to deal with the irregular and mixed movement of the Rohingya population from Rakhine, Myanmar, to Bangladesh, with all the risks and consequences of that irregular movement. Since the deportation of the Rohingya constitutes a crime against humanity as provided in article 7(1)(d) of the Statute. Article 7(1)(d) identified certain criminal acts and conducts to be considered elements that constitute the crime of deportation as follows: “The perpetrator deported or forcibly transferred, ... by expulsion or other coercive acts;... widespread or systematic attack.” Accordingly, and depending on the factual circumstances of the situation that I discussed in II, the acts that constituted the crime of the Rohingya deportation are, altogether, the forcible transfer of people and raping, burning, and killing. The following table shows the elements of the deportation of the Rohingya in accordance with their location. Then, the table identifies the state(s) of the jurisdiction and the most suitable territoriality principle to be claimed by those state(s) as a basis for extending their jurisdiction over the deportation of the Rohingya.

Act location (ex: deportation, removal, transfer.)	Effect location (ex: killing, burning, sexual exploitation.)	Criminal jurisdiction preserves to the state of Myanmar/ Bangladesh/both	Basis of jurisdiction: subjective or objective principles of territoriality
Myanmar	Bangladesh	Both	M→ subjective B→ objective

According to the table, Bangladesh can rely on the objective principle of territoriality as a basis for exercising its criminal jurisdiction over the Rohingya deportation. Although the criminal acts were initiated in the territory of Myanmar, they produced effects within the state of Bangladesh. Therefore, the ICC can claim its jurisdiction over the deportation of the Rohingya in accordance with the same principle as Bangladesh; that is, the objective principle of territoriality. The objective principle gives the ICC the jurisdiction to try, investigate, and punish the crime of deportation as well as any crimes initiated inside Myanmar but extended to Bangladesh. This includes any crime associated with the deportation or any crime resulting from it, such as the killing that took place while crossing the borders, the burning of the villages that led to the flight to the neighboring state, and the raping that occurred inside Myanmar and that pushed the Rohingya people to flee to Bangladesh.

Additionally, as surveyed in Part III(B)(5), article 12(2)(a) of the Statute recognizes only the ICC jurisdiction in accordance to the objective territoriality principle. Thus, the jurisdiction of the court will be limited to the deportation and any criminal acts extended to Bangladesh. As a result, the crimes committed solely inside Myanmar could remain unpunishable.

2. The Principle of *la Compétence de la Competence* Pursuant to Article 119(1) and Article 21(1)(b) of the Statute

The principle of *la compétence de la competence*, under article 119(1) of the Statute⁽¹⁰⁸⁾, is another legal basis invoked by the Chamber to justify extending the jurisdiction of the ICC over the Rohingya deportation. According to this principle, any dispute regarding the jurisdictional matters of the court should be settled by a decision of the court. In this regard, the court observed that the

(108) Rome Statute, supra note 4, article 119 (1) “[A]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court”.

jurisdiction of the court is subject to a dispute with Myanmar based on the public statement issued by Myanmar, in which it explicitly expressed serious concern regarding the ICC's jurisdiction claim and refused to engage with the court in any formal way⁽¹⁰⁹⁾.

However, the Pre-Trial Chamber Judge Marc Perrin de Brichambaut (whom I agree with) issued a solo opinion, in which he emphasizes that the court erred in its reliance on the principle of *la compétence de la compétence* to extend its jurisdiction, for two reasons. The first reason is that relying on the principle of *la compétence de la compétence* at this early stage of proceedings “would be inconsistent with the principle’s purpose and previous jurisprudence”⁽¹¹⁰⁾.

The principle of *la compétence de la compétence* should not be invoked unless it is necessary to resolve a conflict⁽¹¹¹⁾. Even though the court considered the Statement of Myanmar as representing a dispute, in fact, the content of the Statement did not reflect any disagreement regarding any point of law⁽¹¹²⁾.

Actually, the Statement was a mere reminder that the court jurisdiction is limited to the States Parties⁽¹¹³⁾. Furthermore, no previous international court and tribunal had invoked the principle of *la compétence de la compétence* without the existence of a *case* or a *dispute*⁽¹¹⁴⁾. The second reason is that determining jurisdiction should be part of future proceedings⁽¹¹⁵⁾. The ICC is under an obligation, according to article 19(1) of the Statute, to “satisfy itself that it has jurisdiction *in any case* brought before it”, so that attempting to rule on jurisdiction at this stage of the proceedings would presume a result that should be determined at a later and more appropriate stage of the proceedings⁽¹¹⁶⁾.

The Chamber also noted the article 21(1)(b) of the Statute, concerning the applicable laws and rules the court should follow and apply, as a reasonable legal basis that justifies reliance on the principle of *la compétence de la compétence*. Article 21 of the Statute held that “1. The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties

(109) Decision on the “Prosecution’s Request, supra note 13, at 11 para. 28.

(110) Partially dissenting opinion of judge Marc Perrin De Brichambaut, 6 September 2018, at 13 para. 25, https://www.icc-cpi.int/RelatedRecords/CR2018_04205.PDF [Accessed 30 Sep. 2019].

(111) Id. at 26.

(112) Id. at 9 para. 16.

(113) Id.

(114) Id. at 15 para. 28.

(115) Id.

(116) Id. at 17 para. 32.

and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards”⁽¹¹⁷⁾.

In this regard, Judge de Brichambaut pointed out that an *obiter dicta* of the ICC established that the court shall refrain from applying the secondary sources, in accordance with article 21(1)(c) and (b) of the Statute, unless the court’s application of the primary sources of law, in accordance with article 21(1)(a), has proven the existence of a lacuna in the primary sources⁽¹¹⁸⁾. Judge de Brichambaut also referred to the judgment of the Appeal Chamber that held that “in order to determine whether the absence of a power constitutes a ‘lacuna’, it has previously considered whether ‘[a] gap is noticeable [in the primary sources of law] with regard to the power claimed in the sense of an objective not being given effect to by [their] provisions’”⁽¹¹⁹⁾. Judge de Brichambaut asserted that he is not satisfied with the existence of a lacuna to justify recourse to the principle of *la compétence de la compétence*⁽¹²⁰⁾. Furthermore, the judge doubted whether the principle of *la compétence de la compétence* is an established principle of international law, as claimed by the Chamber⁽¹²¹⁾.

In the next section, I will address the influence of world politics and economics on the ICC’s role in the Rohingya crisis.

B. Political and Economic Challenges and ICC’s Role in the Rohingya Crisis

A critical exception to the ICC’s restrictive jurisdiction system is the possibility of a Security Council referral to the court, according to article 13(b) of the Statute. In this case, the acceptance of the non-state party would not be necessary. Therefore, the ICC may have a sort of a universal jurisdiction if it is successfully backed up by the Security Council. However, complex security, political, and economic interests affect the probability of such a referral.

For many states, the Rohingya crisis is not just a matter of human rights, but

(117) Rome Statute, supra note 4, article 21.

(118) Partially dissenting opinion, supra note 110, para. 29.

(119) Id.

(120) Id. para. 29.

(121) Id.

rather a matter of power. Several of the world's most powerful states with U.N. Security Council vetoes, such as China, Russia, and the U.S., are all not parties to the Statute, and they represent a key obstacle blocking the ICC from addressing the Rohingya problem. It is unlikely that these States will refer the situation to the ICC. In fact, these States will likely aim to weaken the ICC's role. This section describes the security, political, and economic relations between Myanmar on the one hand and China, Russia, and the U.S. on the other hand.

1. Myanmar and China

China and Myanmar share an interdependent security and political relations. Both governments help ensure each other's external and internal security and support each other against critics of their political policies⁽¹²²⁾. For instance, when Myanmar was sanctioned and isolated by the international community for its human rights violations, China provided support to Myanmar's regime to ensure its continued survival⁽¹²³⁾.

From 2006 to 2011, China has continuously voted against the United Nations General Assembly (UNGA) resolutions that have condemned Myanmar's poor human rights record⁽¹²⁴⁾. China also vetoed S.C. resolutions that requested that Myanmar release political prisoners and end its military attacks and human rights abuses against ethnic minorities⁽¹²⁵⁾.

Additionally, China was the most important supplier of military equipment and training to Myanmar⁽¹²⁶⁾. Myanmar's Commander-in-Chief Senior General Min Aung Hlaing, during a visit to Beijing on 10 April 2019, said that "Myanmar army is unavoidably relying on the People's Liberation Army... for weapons procurement" and thanked China for "its correct stance and standing against the international community over the Rakhine State issue"⁽¹²⁷⁾. However, China also sought Myanmar's cooperation to meet its

(122) Ian Tsung-yen Chen, *China's Economic Offensive and Its Discontent in Southeast Asia: Diminishing Footprints in Myanmar*, in *China's Footprints in Southeast Asia* 63, 68-69 (2019).

(123) *Id.* at 67.

(124) *Id.* at 68.

(125) For example, China voted against the 2018 resolution adopted by the Human Rights Council in the Situation of human rights of Rohingya Muslims and other minorities in Myanmar. Resolution adopted by the Human Rights Council on 27 September 2018 regarding situation of human rights of Rohingya Muslims and other minorities in Myanmar, A/HRC/RES/39/2, UNGA, 3 October 2018, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/293/69/PDF/G1829369.pdf> [Accessed 1 Oct. 2019].

(126) Ian Tsung-yen Chen, *supra* note 122, at 68.

(127) Nan Lwin, *Myanmar Military Chief Thanks Beijing for Support on Rakhine Crisis*, *The Irrawaddy*, 10 April 2019, <https://www.irrawaddy.com/news/burma/myanmar-military-chief-thanks-beijing-support-rakhine-crisis.html> [Accessed 1 Oct. 2019].

security needs. China has been building port facilities in Myanmar, which are strategically important for China to access the Indian Ocean⁽¹²⁸⁾.

Furthermore, both China and Myanmar's military regime share similarities regarding human rights violations. For example, they both imprison political opponents, suppress minority social movements, and silence the press⁽¹²⁹⁾. China and Myanmar have also used similar methods to manage threats from Muslim minorities, such as Rohingya in Myanmar and Uighurs in China, to their states by means of brutal force and camps to restrict Muslims' right to move freely⁽¹³⁰⁾.

However, the interdependent security and political relations between China and Myanmar have contributed to creating a disproportionate economic relationship between the two states, in which China possesses the ultimate power. China realizes that generating economic Links by maintaining tight economic bonds and providing economic incentives through less restricted Chinese direct investment and financial aid as well as by sharing knowledge is an effective way to increase its political influence over Myanmar⁽¹³¹⁾.

In fact, China's interest in the conflict in Myanmar's Rakhine State goes far beyond politics. The conflict is important to China because of a series of projects that are a part of its Belt and Road Initiative (BRI)⁽¹³²⁾. In 2015, a Chinese consortium won a bid to build both a special economic zone and a deep-sea port on the island of Kyaukphyu, off the coast of Rakhine State⁽¹³³⁾. In early 2017, China opened a long-delayed crude pipeline that reduced China's dependency on the contentious South China Sea by offloading crude oil at Kyaukphyu port and onward through the pipeline⁽¹³⁴⁾. China is still looking for more deals that Myanmar has been hesitant to grant, partly because local residents oppose China's planned acquisition of lands in Rakhine State⁽¹³⁵⁾. For all the reasons stated above, it would be irrational to expect China to refer the Myanmar/Rohingya situation to the ICC.

(128) Ian Tsung-yen Chen, *supra* note 122, at 67-68.

(129) *Id.* at 68.

(130) Simon Denyer, Former inmates of China's Muslim 'reeducation' camps tell of brainwashing, torture, *The Washington Post*, 17 May 2018, https://www.washingtonpost.com/world/asia_pacific/former-inmates-of-chinas-muslim-re-education-camps-tell-of-brainwashing-torture/2018/05/16/32b330e8-5850-11e8-8b92-45fdd7aaef3c_story.html [Accessed 1 Oct. 2019].

(131) Ian Tsung-yen Chen, *supra* note 122, at 65-66.

(132) C. Christine Fair, Rohingya: Victims of a Great Game East, *The Washington Quarterly*, volume 41, issue 3, 63-85, at 72 (2018).

(133) *Id.*

(134) *Id.*

(135) *Id.* See also, Khin Su Wai, Residents oppose acquisition of lands for ecozone, *The Myanmar Times*, 26 June 2018, <https://www.mmtimes.com/news/residents-oppose-acquisition-lands-ecozone.html> [Accessed 1 Oct. 2019].

2. Myanmar and Russia

Myanmar and Russia have military and economic ties⁽¹³⁶⁾. In June 2016, the two countries signed a military cooperation agreement⁽¹³⁷⁾. A U.N. report concerning the economics of Myanmar military said that defense companies from Russia, among other nations, have supplied arms to Myanmar's military since 2016, including weapons used against the Rohingya⁽¹³⁸⁾. Russia, like China, vetoed a U.N. resolution on the situation in Rakhine State⁽¹³⁹⁾.

In the context of economics, economic sanctions were imposed by Western countries on both Russia and Myanmar, so that the two countries “naturally sympathize with and want to help each other”, according to Ludmila Lutz-Auras⁽¹⁴⁰⁾. Russia could serve as a gateway for Myanmar products to post-Soviet areas⁽¹⁴¹⁾. Russia leads the Eurasia Economic Union (EEU), a new free-trade group comprising the newly independent states that were formerly part of the Soviet Union⁽¹⁴²⁾. Vietnam is the first country from the Association of Southeast Asian Nations (ASEAN) that entered into a free trade agreement with the EEU⁽¹⁴³⁾.

In addition to arms trade, Myanmar imports Russian machinery, industrial equipment, vehicles, chemical products, and metals⁽¹⁴⁴⁾. On the one hand, Myanmar exports rice and textiles to Russia⁽¹⁴⁵⁾. Politically, Russia sees Myanmar as part of its pivot to Asia strategy and as a strategic partner that permits Moscow to extend its role as an influential power in Southeast Asia⁽¹⁴⁶⁾. On the other hand, Myanmar sees Russia as a safeguard that provides a sense of coalition with a strong country and that contributes to a more balanced distribution of powers, so that Myanmar can preserve strong ties with its two

(136) Myanmar-Russia ties reviewed, *The Myanmar Times*, 27 March 2017, <https://www.mmtimes.com/national-news/25467-myanmar-russia-ties-reviewed.html> [Accessed 1 Oct. 2019].

(137) Russia, Myanmar Sign Military Cooperation Agreement, *DefenseWorld.net*, 17 June 2016, https://www.defenseworld.net/news/16368/Russia_Myanmar_Sign_Military_Cooperation_Agreement [Accessed 1 Oct. 2019].

(138) The economic interests of the Myanmar military, OHCHR, at 55 para. 155, https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/EconomicInterestsMyanmarMilitary/A_HRC_42_CRP_3.pdf [Accessed 2 Oct. 2019]

(139) Myanmar-Russia ties reviewed, *supra* note 136.

(140) *Id.*

(141) *Id.*

(142) *Id.*

(143) *Id.* See also, Koushan Das, *Expanding Bilateral Trade between the EAEU and Vietnam*, Vietnam Briefing, 27 June 2018, <https://www.vietnam-briefing.com/news/expanding-bilateral-trade-vietnam-eaeu.html/> [Accessed 2 Oct. 2019].

(144) Myanmar-Russia ties reviewed, *supra* note 136.

(145) *Id.*

(146) *Id.*

largest neighboring powers⁽¹⁴⁷⁾, namely, China and India.

3. Myanmar and the U.S.

In 2018, the U.S. imposed sanctions on four Myanmar military and police commanders and two army units, accusing them of “ethnic cleansing” against the Rohingya and of widespread human rights violations⁽¹⁴⁸⁾. Based on the statements made by the five permanent members in the S.C. meeting regarding the situation in Myanmar on 28 February 2019, unlike China and Russia, the U.S., along with the U.K. and France, did not show much support for the option of fostering a dialogue between Bangladesh and Myanmar to address the Rohingya crisis⁽¹⁴⁹⁾.

Instead, the U.S. urged Myanmar to address the crisis in terms of identifying its root causes, creating conditions for the voluntary repatriation of those Rohingya who fled to Bangladesh, improving the living conditions of those Rohingya remaining in Rakhine State, implementing a transparent and efficient citizenship verification process, guaranteeing the freedom of movement, securing access to livelihoods, setting up security reforms, and ensuring accountability for those responsible for human rights abuses⁽¹⁵⁰⁾.

Despite U.S. sanctions and the statement in S.C. against Myanmar, China’s gain in Myanmar seems to be distracting the U.S. attention from its mandate of protecting human rights⁽¹⁵¹⁾. At the Myanmar-Japan-U.S. Forum on fostering responsible investment in Myanmar, which was held in 20 August 2019 in Yangon, the Myanmar’s Directorate of Investment and Company Administration (DICA) disclosed that investment inflows from the U.S. amounted to US\$432.796 million at the end of June 2019⁽¹⁵²⁾.

(147) Ludmila Lutz-Auras, *Russia and Myanmar – Friends in Need?*, *Journal of Current Southeast Asian Affairs*, volume 34, issue 2, 165-198, at 175-191 (2015).

(148) Matt Spetalnick and David Brunnstrom, *U.S. imposes sanctions on Myanmar military over Rohingya crackdown*, Reuters, 17 August 2018, <https://www.reuters.com/article/us-myanmar-rohingya-usa/us-imposes-sanctions-on-myanmar-military-over-rohingya-crackdown-idUSKBN1L21KL> [Accessed 2 Oct. 2019].

(149) *The situation in Myanmar*, S/PV.8477, UNSC, 28 February 2019, <https://undocs.org/en/S/PV.8477> [Accessed 2 Oct. 2019].

(150) *Id.* at 15.

(151) Toru Takahashi, *China’s gains in Myanmar divert US attention from human rights*, *Nikkei Asian Review*, 14 September 2019, <https://asia.nikkei.com/Spotlight/Comment/China-s-gains-in-Myanmar-divert-US-attention-from-human-rights> [Accessed 2 Oct. 2019].

(152) *Myanmar-Japan-US Forum on Fostering Responsible Investment*, DICA, 22 August 2019, <https://www.dica.gov.mm/en/news/myanmar-japan-us-forum-fostering-responsible-investment> [Accessed 2 Oct. 2019].

During the forum, Myanmar State Counselor Daw Aung San Su Kyi noted that some well-known U.S. brands such as General Electric, Chevron, and the Ford motor company were present in Myanmar⁽¹⁵³⁾. On 2 September 2019, the U.S. Navy engaged in joint military drills with ASEAN forces, including Myanmar's military⁽¹⁵⁴⁾.

Given the inconsistent and ambiguous U.S. policy regarding the situation in Myanmar, it is hard to imagine that the U.S. would consider referring Myanmar to the ICC by means of an SC resolution—at least not in the near future.

In the next section, I will uncover some alternative ways of enabling the international community to overcome the challenges to ICC jurisdiction and to address issues of accountability arising from the Rohingya crisis.

C. Overcoming the Challenges to Address the Rohingya Crisis

Despite the systemic, jurisdictional, legal, political, and economic challenges surrounding the Rohingya crisis and despite the little hope for a referral by the U.N. Security Council to the ICC, this paper emphasizes that seeking support from the international community would seem to be the most effective approach to ensure that accountability mechanisms that are transparent, impartial, and independent are taking place to address the Rohingya crisis.

For example, international pressure prompted Myanmar to establish a commission to investigate human rights violations in the Rakhine State⁽¹⁵⁵⁾. However, it is highly unlikely that Myanmar will use its domestic legal system to hold the perpetrators responsible for the crimes they committed because of the “the pervasive culture of impunity” in Myanmar, as per the description of the UN Fact-Finding Mission⁽¹⁵⁶⁾. Such allegation has become even more credible after the case of two Reuters journalists, Wa Lone and Kyaw Soe Oo, who were arrested in Myanmar in December 2017 for trying to investigate the killing of 10 Rohingya men⁽¹⁵⁷⁾.

Nevertheless, different paths that may be taken by the international community include pushing for a comprehensive peace agreement, deepening the involvement

(153) Id.

(154) Toru Takahashi, *supra* note 151.

(155) Simon Lewis and Poppy McPherson, Myanmar appoints panel to probe Rohingya abuses, Reuters, 30 July 2018, <https://perma.cc/HN9N-M6RV> [Accessed 2 Oct. 2019].

(156) Report of the independent international fact-finding mission on Myanmar, *supra* note 6, at 1.

(157) Tom Lasseter, Dangerous news: how two young reporters shook Myanmar, Reuters, 8 August 2018, <https://www.reuters.com/investigates/special-report/myanmar-reporters-democracy/> [Accessed 27 Oct. 2019].

of international humanitarian aid and human rights agencies and organizations, and referring the situation to the International Court of Justice (ICJ).

1. A Comprehensive Peace Agreement

There is an accompanying effort to reach a comprehensive peace agreement, and this is an ongoing process with some limited outcomes. A Nationwide Ceasefire Agreement (NCA) that has been under consideration since March 2015 is to be concluded between the government of Myanmar and representatives from various nonstate ethnic armed groups⁽¹⁵⁸⁾. Such an agreement involves long-term peace negotiations that are meant to pave the way for peace-building and to facilitate national dialogue⁽¹⁵⁹⁾. The third 21st Century Panglong Union Peace Conference took place in July 2018: for the first time, all groups attended, including those who have not yet signed a ceasefire agreement with the government⁽¹⁶⁰⁾.

However, no progress was made on constitutional and security issues at the conference⁽¹⁶¹⁾. The government hoped to complete the peace process by the 2020 elections⁽¹⁶²⁾.

2. The International Humanitarian Aid and Human Rights Agencies

Strengthening the role of agencies and organizations such as Amnesty international, the United Nations Development Programme (UNDP), the Office of the United Nations High Commissioner for Refugees (UNHCR), the Human Rights Watch, and the PILPG is an effective way to build a foundation for future accountability efforts. The work of these groups is important for the investigation and documentation of atrocities; thus, the extracted and collected evidence can be used later when options for accountability appear in the future.

Additionally, these groups can play an essential role in the implementation of peace arrangements on the ground. For instance, during the S.C. meeting regarding the situation in Myanmar in February 2019, several states such as Indonesia, Belgium, and Bangladesh emphasized the importance of ensuring the application of the recommendations of the Kofi Annan Advisory Commission on Rakhine State, a commission established in collaboration with the Kofi Annan Foundation and the Office of the State Counsellor of

(158) Myanmar's Nationwide Ceasefire Agreement, ISDP, October 2015, <http://isdpr.eu/publication/myanmar-nationwide-ceasefire-agreement/> [Accessed 2 Oct. 2019].

(159) *Id.*

(160) Jon Lunn, *supra* note 1, at 10.

(161) *Id.*

(162) *Id.*

Myanmar⁽¹⁶³⁾. The recommendations particularly covered matters related to the voluntary return of refugees and the security issues in Rakhine State⁽¹⁶⁴⁾.

3. The International Court of Justice (ICJ)

Referring the situation to the ICJ is an option that could be undertaken by Bangladesh authorities on the grounds of self-defense and the necessity of humanitarian intervention. An example of humanitarian intervention is India's war against Pakistan in 1971, when the Bengali population of East Pakistan attempted to secede from the government of Pakistan and the Pakistani army violently suppressed the insurrection. As a result, an estimated 10 million refugees fled the violence to the Indian border. Citing self-defense and humanitarian intervention, India invaded East Pakistan, which led to the independence of Bangladesh⁽¹⁶⁵⁾.

However, ongoing negotiations between Bangladesh and Myanmar regarding a peaceful resolution would seem to interfere with the possibility of calling for humanitarian intervention by Bangladesh at the present⁽¹⁶⁶⁾.

The principle of universality is another ground for bringing the matter to the ICJ's attention that could be invoked by any third party, either a neighboring state to Myanmar or not⁽¹⁶⁷⁾.

One of the examples grounded in the principle universality is the case of the former Chilean dictator, Augusto Pinochet, who was arrested in London under universal jurisdiction⁽¹⁶⁸⁾.

In an attempt to pursue justice for the Rohingya on the grounds of universality, a prosecution application was filed in March 2018 by lawyers in Australia against Myanmar's leader Aung San Suu Kyi, who was in Australia at that time, on charges of crimes against humanity⁽¹⁶⁹⁾.

However, a universal jurisdiction prosecution in Australia requires the

(163) The situation in Myanmar, *supra* note 149.

(164) Final Report of the Advisory Commission on Rakhine State, Rakhine Commission, <http://www.rakhinecommission.org/> [Accessed 2 Oct. 2019].

(165) Gary J. Bass, *The Indian Way of Humanitarian Intervention*, *Yale Journal of International Law*, volume 40, issue 2, 227-294, at 228 (2015). See also, Elliot Higgins, *Transitional Justice for the Persecution of the Rohingya*, *Fordham International Law Journal*, volume 42, issue 101, 101-126, at 123 (2018), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2724&context=ilj> [Accessed 27 Oct. 2019].

(166) *Id.* at 124-125.

(167) *Id.*

(168) *Id.* at 122.

(169) Ben Doherty, *Aung San Suu Kyi: lawyers seek prosecution for crimes against humanity*, *The Guardian*, 16 March 2018, <https://www.theguardian.com/world/2018/mar/17/aung-san-suu-kyi-faces-prosecution-for-crimes-against-humanity> [Accessed 2 Oct. 2019].

approval of the attorney general. Such consent was not granted⁽¹⁷⁰⁾. In the same vein, Canada is also being pressed to initiate proceedings against Myanmar before the ICJ. On 29 May 2019, the All-Party Parliamentary Group for the Prevention of Genocide and other Crimes Against Humanity urged Canada to initiate legal proceedings before the ICJ regarding Myanmar's breach of the Genocide Convention⁽¹⁷¹⁾.

On 25 June 2019, a letter cosigned by 34 senators and more than 100 human rights organizations and activists was sent to Foreign Affairs Minister Chrystia Freeland calling for Canada to take the initiative to activate the role of the ICJ in the dispute between Myanmar and Bangladesh⁽¹⁷²⁾. Similarly, the Dutch House of Representatives asked the Dutch government to take the case to the ICJ⁽¹⁷³⁾.

V. Conclusion

This research paper attempted to shed light on the Rohingya problem, particularly the problem of atrocities that are transnational between two states, one of which is a party to the ICC and the other is not. Even though ending the suffering of the Rohingya has become nearly a worldwide desire, an appropriate approach to justice is still subject to debate. This research paper emphasized that a comprehensive solution to the problem should not be expected from the ICC, given the complex legal, systemic, jurisdictional, political, and economic challenges surrounding the situation. Therefore, this research recommended alternate strategies to address the crisis based on support from the international community.

The second part of this paper (The Rohingya crisis: the context and background) described the problem and how it has historically developed. The third part explained the ICC system. The third part also shed light on some of the systemic and jurisdictional weaknesses of the ICC system. In the fourth part, the paper addressed the question of whether the ICC has the right to extend its jurisdiction over the deportation of the Rohingya from Myanmar, a nonstate member of the ICC, to Bangladesh, a state member of the ICC. The fourth part then proceeded with a description of the main political and economic

(170) Id.

(171) Press Release, Statement: Genocide and Repatriation, The Stateless Rohingya, 22 August 2019, <https://www.thestateless.com/2019/08/statement-genocide-and-repatriation.html> [Accessed 2 Oct. 2019].

(172) Id.

(173) Star Online Report, Dutch House of Representatives adopts motion for probe on Rohingya genocide, The Daily Star, 5 July 2019, <https://www.thedailystar.net/rohingya-crisis/news/dutch-house-representatives-adopts-motion-probe-rohingya-genocide-1767124> [Accessed 2 Oct. 2019].

challenges that the ICC is encountering in addressing the problem. Further, the fourth part provided options for justice that may be undertaken by the international community to ensure accountability for the atrocities committed against the Rohingya.

In the end, I hope that I was successful in arguing that different paths other than the ICC must be undertaken for an inclusive peace in Myanmar, particularly to achieve justice for the Rohingya.

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